

~~DC 08-0887~~  
FR 06-0120

FILED

July 17 2009

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

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**MONTANA THIRTEENTH JUDICIAL DISTRICT COURT  
YELLOWSTONE COUNTY**

STATE OF MONTANA,

Plaintiff,

vs.

GORDON SEES THE GROUND, JR.,

Defendant.

Cause No. DC 08-695

Judge Russell C. Fagg

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER

This matter was referred to the undersigned by the Montana Supreme Court regarding disqualification of Judge Greg Todd in this case. The Court held a hearing on July 8, 2009. No evidence was presented at the hearing. However, counsel for both parties, Vicke Callender for the State of Montana, and Lance Lundvall for Defendant, argued their positions. A review of this file, as well as the underlying file, lead to the following:

FINDINGS OF FACT

1. Defendant was tried on December 11 and 12, 2008, in DC 08-69, on the charges of Count I, Driving While Under the Influence of Alcohol and/or

1 Drugs (FELONY), and Count II, Driving While License is  
2 Suspended/Revoked (MISDEMEANOR).

- 3 2. During the course of the underlying case, DC 08-69, Judge Todd made  
4 several rulings on motions made by Defendant or his court-appointed  
5 counsel. Specifically, Judge Todd denied Defendant's Motion to Disqualify  
6 his re-assigned counsel, Marvin McCann. The basis of the motion was that  
7 Mr. McCann had been a former prosecutor and was now Defendant's  
8 attorney. Defendant argued that § 37-61-413, MCA, prohibited any attorney  
9 that had ever prosecuted in his life from ever being a criminal defense  
10 attorney. As noted, Judge Todd disagreed, and denied Defendant's motion.  
11 3. On June 29, 2008, Defendant filed a *pro se* motion to dismiss the case with  
12 prejudice. A hearing was held on July 22, 2008, addressing several issues,  
13 but the issues surrounded Defendant's claim that his public defender had  
14 not been diligent and had not represented him sufficiently well in the case.  
15 A Stage I Finley hearing was held before Judge Todd. Judge Todd denied  
16 the Finley motion as not seemingly substantial.  
17 4. At another point in the underlying case, Defendant requested the  
18 opportunity to represent himself. After Judge Todd discussed the problems  
19 and pitfalls of *pro se* representation, Defendant agreed to proceed with his  
20 current counsel.  
21 5. Another hearing was held on October 1, 2008, regarding Defendant's  
22 Motion to Dismiss based upon lack of probable cause to believe Defendant  
23 was in actual physical control of his vehicle. A video recording from the  
24 officer's in-car camera was admitted into evidence. Judge Todd denied  
25 Defendant's Motion and found that the officer had probable cause to arrest  
26 the Defendant for the two charges.  
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6. As noted, trial was held on December 11 and 12, 2008. After the trial, the jury returned a verdict of guilty on both counts. During the trial, Defendant testified that he was not the driver of the vehicle, but the driver was an individual named Orrie Plain Bull. In this case, DC 08-695, is a Perjury (FELONY) charge, alleging the Defendant perjured himself when testifying in Cause No. DC 08-69, when he stated that Orrie Plain Bull was the driver of the vehicle.
  7. In a later development, on April 14, 2009, Defendant filed a *pro se* Motion to Disqualify all of the 13<sup>th</sup> Judicial District Court Judges. The Montana Supreme Court denied Defendant's motion.
  8. This latest motion, filed on May 21, 2009, requested a disqualification of Judge Todd. At the hearing held on July 8, 2009, Defendant argued that Judge Todd is a witness to the alleged offense which causes a conflict. Defendant also argued that there may not be actual bias, but there is more than an appearance of impropriety associated with Judge Todd sitting on this case.

From the above Findings of Fact, the Court enters the following:

#### CONCLUSIONS OF LAW

1. Under § 3-1-805, MCA, a defendant may move to disqualify a sitting judge for cause 30 days before trial. The moving party must file an Affidavit alleging personal bias and the Affidavit must be made in good faith. In this case, the appropriate motion and Affidavit for disqualification were filed by the Defendant on May 21 2009.
2. The Montana Supreme Court has stated that the moving party must meet its burden by "raising a strong presumption of actual bias." In *re Gahr* (1984), 212 Mont. 481, 485, 689 P.2d 257, 259. In this case, the Court

1 concludes Defendant has not raised a strong presumption of actual bias.

2  
3 3. The mere fact that Judge Todd has ruled against the Defendant on various  
4 motions is not sufficient to disqualify the Judge from presiding in a different  
5 case involving the same litigant. See *State v. Langford* (1994), 267 Mont.  
6 95, 882 P.2d 490. See also an article entitled *Disqualification of Judge for*  
7 *Having Decided Different Case Against Litigant*, 85 A.L.R. 5<sup>TH</sup> 547, Section  
8 2.

9 4. Defendant did not testify in this hearing, nor did Defendant call any  
10 witnesses. Likewise, no witnesses were called by the State. No evidence  
11 has been produced in the form of testimony of actual bias. Defendant rests  
12 his case on his Affidavit, as well as the rulings made by Judge Todd. The  
13 Affidavit alone is insufficient to meet this burden. See *In re Gahr*, Id at 260,  
14 486. The rulings made by Judge Todd are also not sufficient to prove actual  
15 bias. In fact, upon review by this Court, the rulings seem appropriate and in  
16 line with Montana law.

17 5. The mere fact that Judge Todd was a witness to the underlying case also  
18 does not merit disqualification. The State argued during the hearing that  
19 Judge Todd would not be called as a witness to the perjury charge. In fact,  
20 Judge Todd would not be necessary, as the State was planning to prove  
21 the perjury charge by introducing a transcript of the underlying case, which  
22 would outline the Defendant's statements, and then prove to the jury  
23 hearing the perjury charge that Defendant was, in fact, the driver of the  
24 vehicle. Presumably, the State would be using the videotape and other  
25 evidence for that proof. However, the issue is not whether the State can  
26 prove its perjury charge. The issue is whether there is actual bias. The mere  
27 fact that Judge Todd was a witness to the alleged perjury offense, does not

disqualify him from sitting on this case. There has been no showing or presumption of actual bias. Accordingly,

**IT IS HEREBY ORDERED** that Defendant's Motion to Disqualify Judge Todd is **DENIED.**

DATED this 10<sup>th</sup> day of July, 2009.

Russell C. Fagg, District Court Judge

cc: YCAO/vc  
Lance Lundvall  
Hon. Gregory R. Todd  
Montana Supreme Court